UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

KEVIN LYNCH,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**Civil Action No. 03-2489 (RMC)**
	)	
WEST PUBLISHING CORP.,	)	
	)	
Defendant.	)	
	)	

MEMORANDUM OPINION

Kevin Lynch has filed suit against West Publishing Corporation ("West")[1] alleging discriminatory failure to promote and retaliation, in violation of the Civil Rights Act, 42 U.S.C. § 1981, and the D.C. Human Rights Act, D.C. Code § 2-1402.11. West agrees that Mr. Lynch has established some elements of his *prima facie* case of discrimination: he is African American, a protected class; he was qualified for the position; and a White male was selected. Still, West argues that Mr. Lynch was not better qualified than the person hired and, further, that its non-promotion decision was based on legitimate, non-discriminatory reasons. It files for post-discovery summary judgment.

Because the merits of the failure-to-promote claim cannot be determined from the

[1] The Court reminds plaintiff's counsel that the defendant is West Publishing Corporation, *not* "West Group." The plaintiff filed an identical action, *Kevin Lynch v. West Group*, on January 24, 2003, but never served Mr. Lynch's employer, West Publishing Corporation. Plaintiff obtained an entry of default, which the Court vacated on December 1, 2003, and dismissed *Lynch v. West Group* without prejudice. The instant case was then filed. Plaintiff's counsel nonetheless persists in his use of the term "West Group."

written record, West's motion for summary judgment on that claim will be denied. Because the retaliation claim lacks merit, West's motion for summary judgment on that claim will be granted.

FACTS

West is a well-known publisher of legal materials and provider of on-line legal research services and products. Its sales staff is responsible for generating new sales of on-line services and printed materials, while its account management staff works to service, maintain, and increase existing business. West provides services to law firms, governments, academia, and corporations.

In June 1994, Mr. Lynch was hired by West as an Account Representative in the Washington, D.C. office. He was promoted to Account Manager in the Sales and Account Management division in March 1998, a position he currently holds.

Account Managers report to Regional Managers who report to a Director of Account Management within their geographic area. Directors of Account Management report to a division Vice President and General Manager. As relevant here, Karen Talty, who hired Mr. Lynch, was the division Vice President and General Manager with authority over Washington, D.C. Two Directors of Account Management reported to Ms. Talty: Michael Abbot, who was responsible for Maryland, Virginia, West Virginia, and the District of Columbia, and Maria Redmond, who was responsible for the Carolinas, Georgia, Florida, Puerto Rico, and the Virgin Islands. Three Regional Managers reported to Mr. Abbott.

Between January 2001 and July 2002, Michael Abbott was a Regional Manager and Mr. Lynch's direct supervisor. When Mr. Abbott was promoted to Director of Account Management, West posted the vacated Regional Manager position on some external websites and

on its intranet, inviting applications from all company employees. Mr. Lynch was one of eight candidates who applied. Mr. Abbott and Sara Birmingham, the Human Resources Manager who supported Ms. Talty's division, interviewed the candidates and narrowed the list to three. The finalists, to be interviewed by Ms. Talty, were Mr. Lynch, Tommy Williams, an account manager in Florida, and Andrea Koppelman, an account manager in Washington, D.C. Mr. Williams and Ms. Koppelman are White.

Because Mr. Williams won the promotion, it is important to compare his background to Mr. Lynch's to determine if, as he claims, Mr. Lynch was more qualified for the Regional Manager position. Mr. Lynch received his undergraduate degree from Princeton University and his Juris Doctorate from Georgetown Law School.[2] Mr. Williams received both of his degrees from the University of Mississippi.[3]

It is undisputed that Mr. Lynch had worked at West longer than either of the other candidates, although his tenure exceeded Mr. Williams's by a mere four months. Mr. Lynch has received awards for being one of the top Law Firm Account Managers in the country for the months of December 2000, December 2001, and March 2002. In 1999, he was placed in the President's Club winners circle for exceeding the revenue goal for his territory, for which he received a $10,000 check and an expense-paid trip to Hawaii. He was also recognized by West when he successfully negotiated an agreement that resulted in a 22 percent increase in guaranteed revenue, for leading a deal with $72,000 in revenue, and for leading a deal with a $1.2 million contract value. He relates

---

[2] Unlike Mr. Williams, Mr. Lynch never took a bar exam.

[3] At defendant's invitation, the Court takes judicial notice of the fact that Princeton and Georgetown are generally rated more highly than the University of Mississippi.

instances of communications from senior management congratulating him on his accomplishments in January 2001, November 2001, and April 2002. The November 2001 communication was an email from Mr. Abbot, relating the fact that two law firm clients "sang his praises and said how wonderful[ly] he did." Opp. at 8. In 2002, Mr. Lynch received a 5 percent salary increase when the standard for the year was 2 percent. In addition, because of his experience in the D.C. metropolitan area, Mr. Lynch asserts that he has more relevant experience working with local law firms.

While credentialed, Mr. Lynch's employment with West has not been without incident. On seven or eight occasions during his career at West, customers have asked that Mr. Lynch be removed from their accounts. While almost all Account Managers have had this experience once or twice, Mr. Lynch's pattern of account losses was unusual. Mr. Lynch was never disciplined or placed on a performance improvement plan relating to those losses. Indeed, Mr. Abbott investigated each incident and concluded on more than one occasion that Mr. Lynch had done nothing wrong. Still, customer complaints that Mr. Lynch had been rude, abrasive, or slow to respond were corroborated at other times.

In contrast, Mr. Williams has three years of litigation experience in the Dallas District Attorney's office and has succeeded as an Account Manager in West offices in New York and Miami. He has accumulated his own sales awards and honors, including a divisional award for Account Manager of the Year in 2000, when he exceeded his $6.9 million goal by $1.3 million dollars. No customer has ever asked that he be taken off an account.

Mr. Williams had applied unsuccessfully for two promotions in the past. He also had the rare opportunity to fill in for his Regional Manager, Will Miller, when Mr. Miller was out of the office on disability leave for a few months. At that time, Ms. Redmond was pregnant and also

recovering from a disability. She needed someone to help her manage her area and received approval for a temporary position for Mr. Williams.

Ms. Talty interviewed the three finalists. Because Ms. Redmond was in Washington on the date of the interviews, Ms. Talty asked her to participate in the interviews along with Ms. Birmingham and Mr. Abbott. Each of the interviewers selected Mr. Williams as the preferred candidate based, in large part, on his strong interpersonal skills. *See* West Motion for Summary Judgment at 25 ("Motion"). Ms. Talty, the most senior manager, relied on Mr. Williams's "successful negotiations, customer relationships, technical skills; his ability to be an extremely strong team player." *Id.*; Talty Dep. 84:17 - 86:8.

Mr. Lynch's retaliation claim is based on the fact that he and Brian Pittman, a Sales Representative, were compensated differently for their work on a successful sales pitch to a local D.C. law firm. These differences are directly attributable to the fact that Mr. Lynch's position as an Account Manager has a different compensation plan than that of a Sales Representative, which Mr. Lynch concedes.

LEGAL STANDARD

Summary judgment is appropriate when there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law. FED. R. CIV. P. 56(c); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). This procedural device is not a "disfavored legal shortcut." *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986). Rather, it is a reasoned and careful way to resolve cases fairly and expeditiously. *Id.* In determining whether a genuine issue of material fact exists, the Court must view all facts and reasonable inferences in the light most favorable to the non-moving party. *Matsushita Elec. Indus. Co. v. Zenith Radio*, 475 U.S.

574, 587 (1986); *Tao v. Freeh*, 27 F.3d 635, 638 (D.C. Cir. 1994). To be "material" and "genuine," a factual dispute must be capable of affecting the substantive outcome of the case. *Anderson*, 477 U.S. at 247-48; *Laningham v. United States Navy*, 813 F.2d 1236, 1242-43 (D.C. Cir. 1987).

ANALYSIS

Mr. Lynch brings this suit for race discrimination under the Civil Rights Act, 42 U.S.C. § 1981,[4] and the D.C. Human Rights Act, D.C. Code § 2-1402.11.[5] In the absence of direct

---

[4] The Civil Rights Act of 1866, 42 U.S.C. § 1981, reads:

> (a) Statement of equal rights. All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.
>
> (b) "Make and enforce contracts" defined. For purposes of this section, the term "make and enforce contracts" includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.
>
> (c) Protection against impairment. The rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of state law.

[5] The D.C. Human Rights Act, D.C. Code § 2-1402.11, reads in pertinent part:

> (a) General. It shall be an unlawful discriminatory practice to do any of the following acts, wholly or partially for a discriminatory reason based upon the actual or perceived: race, color, religion, national origin, sex, age, marital status, personal appearance, sexual orientation, family responsibilities, disability, matriculation, or political affiliation of any individual:
>
> (1) By an employer. To fail or refuse to hire, or to discharge,

discrimination, courts generally apply the burden-shifting scheme set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) in employment discrimination cases.[6] Under that framework, the plaintiff must first establish by a preponderance of the evidence a *prima faci*e case of discrimination.[7] If successful, the burden of production shifts to the employer to articulate a legitimate, nondiscriminatory reason for its conduct. "If the employer meets this burden, the presumption of intentional discrimination disappears, but the plaintiff can still prove disparate treatment by, for instance, offering evidence demonstrating that the employer's explanation is pretextual." *Raytheon Co. v. Hernandez*, 540 U.S. 44, 50 (2003). *See also St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 507-08 (1993).

West concedes that "Plaintiff's claims succeed only at the level of his prima facie case: he can establish that he is a member of a protected class, that he sought and was denied a promotion, and that the promotion in question went to a white employee, not a member of Plaintiff's

---

> any individual; or otherwise to discriminate against any individual, with respect to his compensation, terms, conditions, or privileges of employment, including promotion; or to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities, or otherwise adversely affect his status as an employee[.]

[6] The plaintiff notes that "[p]roof of discrimination is established under the D.C. Human Rights Act in much the same way as it is established under the [*McDonnell Douglas*] tripartite framework." Opp. at 12 (citing *United Planning Org. v. District of Columbia Comm'n on Human Rights*, 530 A.2d 674, 676-77 (D.C. 1987); *Atl. Richfield Co. v. District of Columbia Comm'n on Human Rights*, 515 A.2d 1095, 1099 (D.C. 1986); *RAP, Inc. v. District of Columbia Comm'n on Human Rights,* 485 A.2d 173, 176-77 (D.C. 1984).

[7] Under Section 1981, a plaintiff makes out a *prima facie* case by showing that: 1) he belongs to a protected class; 2) he suffered an adverse employment action; and 3) he was replaced by a member of a non-protected class of equal or lesser qualifications. *Lewis v. Booz-Allen & Hamilton, Inc.*, 150 F. Supp. 2d 81, 94 (2001). "The burden of establishing a *prima facie* case of disparate treatment is not onerous." *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981).

protected class." Motion at 24. It further acknowledges that Mr. Lynch was qualified for the promotion. *See* Reply at 3 ("As set forth in Defendant's opening brief, it is undisputed that Plaintiff is a member of a protected class, that he was qualified for the position in question, and that he suffered an adverse employment action in that he was not selected for the position."). Nonetheless, West argues that Mr. Lynch has not produced evidence that he was more qualified for the Regional Manager position and, furthermore, that it has articulated legitimate, non-discriminatory reasons for hiring Mr. Williams instead of Mr. Lynch.

> Mr. Williams' strong interpersonal skills and solid history of customer relations, his technical abilities, the fact that his successful account management strategies in Florida and his ideas for the Regional Manager position were consistent with the changes Ms. Talty wanted to make in the northern part of the division. In addition, they believed that Mr. Williams' experience as acting Regional Manager gave him an advantage over the other candidates.

Motion at 26 (internal citations omitted). By contrast, West maintains that too many "[q]uestions nagged the decision-makers about Plaintiff's interpersonal skills and customer relations track record . . . ." West Statement of Undisputed Fact ¶ 64.

> Ms. Talty was concerned that Plaintiff would not be able to manage customer demands, even unreasonable ones, in light of his continuing feelings of frustration and unfairness related to his account removals, and his continued refusal to take responsibility for some customers' perceptions that he had been rude or abrasive.

Id. ¶ 65.

From the written page, it is difficult to determine whether the differences between Mr. Lynch and Mr. Williams are truly meaningful or whether they represent stereotypes that mask a discriminatory bias that influenced the promotion decision. This difficulty permeates the record and inhibits a cogent assessment of bias at every level of the *McDonnell Douglas* burden-shifting

framework. Obviously, West was lucky enough to have two very strong candidates for promotion. Whether Mr. Williams was selected without regard to Mr. Lynch's race is too close a call to make on the written record alone and West's summary judgment motion on this claim will be denied.

In addition to his failure-to-promote claim, Mr. Lynch alleges that West retaliated against him by compensating him differently than another West employee in connection with the negotiation of a multi-year contract with a D.C. law firm. To establish a *prima facie* case of retaliation, Mr. Lynch must show that: 1) he engaged in a protected activity; 2) he suffered an adverse employment action; and 3) there is a causal connection between the two. *Paquin v. Fed. Nat'l Mortgage Ass'n*, 119 F.3d 23, 31 (D.C. Cir. 1997). Mr. Lynch admits that he and Mr. Pittman worked under different compensation programs. Merely observing a pre-established compensation plan is not evidence of an adverse employment action. Mr. Lynch has failed to make out a *prima facie* case of retaliation. West's motion for summary judgment on this claim will be granted.

For the reasons stated, West's motion for summary judgment will be granted in part and denied in part. It will be **GRANTED** as to the retaliation claim and **DENIED** as to the failure-to-promote claim.[8] A separate memorializing order accompanies this memorandum opinion.

DATE: December 6, 2004.

/s/
ROSEMARY M. COLLYER
United States District Judge

[8] West has also filed a Motion to Strike Evidence Offered in Support of Plaintiff's Opposition to Defendant's Motion for Summary Judgment. As the Court has not considered any of the objectionable evidence, the Motion will be denied as moot.